Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1149

ALBERT HOFFMAN and RUDOLPH NESS

Petitioners

vs.

PUBLIC EMPLOYES' RETIREMENT FUND

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE OREGON SUPREME COURT

Respondent

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In Propria Persona.

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The right to counsel in civil and criminal proceedings is a right guaranteed to the citizens of the United States by the Sixth Amendment to the Federal Constitution and the Judiciary Act of 1789 Ch.20, Section 35, 1 Stat. 92.

Legislation rejected by the people at a general election does not authorize any public body to proceed contrary to the will of the people and mandamus proceedings should have forced the public body to comply with the will of the people regardless of legislative enactment.

Legislation should not result in one man having privileges over that of all other citizens of the state of Oregon or in any other state of the United States at any time after it's repeal by the people.

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PETITION FOR WRIT OF CERTIORARI TO THE OREGON SUPREME COURT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Albert Hoffman and Rudolf Ness, acting as their own attorneys, Pray that a Writ of Certiorari issued to review the judgement of the Oregon Court of Appeals entered in the above case on October 4, 1977. A request to reconsider [its] decision was denied on November 2, 1977 and on November 15, 1977, the Oregon Supreme Court denied a petition for review and this petition followed within time allowed.

OPINIONS BELOW

The decision and Order of the Oregon Court of Appeals for the State of Oregon is attached as Appendix "A".

JURISDICTION

The jurisdiction of [this] Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED.

Was it not a violation of the *Judiciary Act of 1789* Ch. 20 Section 35, 1 Stat. 92 to deny petitioners who were appearing in propria persona of [their] right to the assistance of layman "counsel" in civil proceedings before the Oregon courts?

Was it not error for the inferior courts to uphold a Gubernatorial Pension Fund enacted by the Oregon Legislature and rejected by a vote of the people at the next general election?

Can the Oregon Appeals Court grant oral argument to only members of the State Bar Association and deny that privilege to persons appearing in propria persona by Court Rule?

STATUTES INVOLVED

The Judiciary Act of 1789 Chapter 20 Section 35, 1 Stat. 92
The Fourteenth Amendment of the United States Constitution
The Sixth Amendment to the United States Constitution
Oregon Supreme Court and Court Appeals Rule 8.10
Oregon Constitution Article I section 20

STATEMENT OF THE CASE

Plaintiffs, acting as their own attorney and with the assistance of a layman counsel, obtained an Alternative Writ of Mandamus (A. 2) directed towards the Public Employes' Retirement Board of the State of Oregon. The purpose of the Writ was to stop a pension program for Governors which the Legislature had enacted but was rejected by the vote of the people by way of the "Initiative." The Writ was brought by the plaintiffs who alleged having a general interest in the faithful execution of the law and that the Attorney General refused to bring the action.

At the trial, Plaintiffs filed a motion requesting the assistance of Robert J. Wright as [their] counsel (A.10). The motion indicated that Mr. Wright was not a member of any Bar Association, but had the required knowledge and experience and was well respected throughout the State of Oregon. Mr. Wright was self-taught by virtue of actual experience in some 250 civil and criminal cases and further teaches a course on how to act as your own attorney. Mr. Wright is probably the only person in the state of Oregon who ever successfully represented criminals before the inferior courts of Oregon in some 10 cases winning all of them for his clients and without being a member of the Bar. The trial judge was aware of Mr. Wright's knowledge and experience but never the less, compelled plaintiffs to proceed to trial against the Attorney General's staff.

Plaintiffs had tried to get licensed attorneys to represent them at the trial but no attorney would take the case, probably because of political reasons.

For the sake of brevity, the ultimate factual result is that one man, former Governor Tom McCall, will receive a pension which was rejected by the unanimous vote of the people at a General Election and [he] will be the only governor thus privileged.

Plaintiffs believe that had the Court permitted them to have the assistance of Robert J. Wright as [their] counsel at the trial, the final outcome would have been different and the will of the people would have prevailed.

In appealing the decision to the Oregon Court of Appeals, said Court has a Rule that Bars non-lawyers from oral argument. The Ultimate result of the Rule is that all cases coming before the Oregon Court of Appeals are argued orally except those where the parties appear in propria persona.

So as not to mislead the Court, the "referendum" was not available to the people because the Oregon Legislature had "unjustifiably" placed an emergency clause on the Gubernatorial Retirement Act thus forcing the people to revert to the "initiative" to reject the Act. Governor Tom McCall then signed the Bill into law and was able to contribute towards the pension program a short period before the measure was repealed.

A pension is not available to any future governor and Tom McCall will be the one single citizen benefiting from the Act.

REASONS FOR GRANTING THE WRIT

1. The right to Counsel is not restricted to only members of the State Bar Association. The Judiciary Act of 1789 Ch. 20 Section 35, (1 stat. 92) clearly grants a choice between counsel or attorney at law. The terms are used alternatively.
2. When the people take the trouble to gather signatures on an initiative petition, and because of it, a measure is repealed at the next general election. Mandamus proceedings should have forced the State Agency to comply with the will of the people instead of proceeding under repealed laws.
3. The Citizens of the United States who reside in the State of Oregon voted against a Gubernatorial Retirement Fund. If Certiorari is not granted, former Governor Tom McCall will get a pension anyway.

It Was Error for the Oregon Courts to Deny Peitioners their Right to the Assistance of Layman Counsel as opposed to a Licensed Member of the State Bar.

Section 35 of the *Judiciary Act of 1789,* Ch. 20, (1 stat. 92)

> "And be it further enacted, that in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of counsel or attorneys at law as by the rules of the said courts shall be permitted to manage and conduct causes therein
>
> [Emphasis supplied]

The United States Constitution, in the Sixth Amendment sets forth that:

> *"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."*

For the sake of brevity, the usage of the word "counsel" in both the Judiciary Act and in the Sixth Amendment leaves no room for honest argument as to the intent of the founding Fathers in [their] usage of the word "counsel" as opposed to the term "Attorneys at law."

The words are employed alternatively, giving the people a definite choice.

While 100 pages of case citations could parrot [this] Court's decisions on the proper construction of the Constitution and the words employed therein, petitioners will only remind [this] Court of its most recent decisions which the State courts are reluctant to follow:

In Faretta v. California, 422 US 806 (1975) [This] Court ruled that a defendant may represent himself or herself if he or she knowingly and intelligently waives his right to counsel and the Court further conceded that because of the anti-lawyer climate apparent at the time of the passage of the Bill of Rights, it was somewhat doubtful that the proponents of the Sixth Amendment intended to limit representation of defendants exclusively to attorneys. [Emphasis supplied]

It can likewise be conceded that the various court rules can determine WHO shall be permitted to manage and conduct causes therein. [Emphasis supplied]

Court Rules should be in aid of Legislation and not tend to repeal it. The term WHO must be applied to COUNSEL as well as LICENSED ATTORNEY AT LAW.

The Rule tends to protect the Courts from the disorderly conduct of both attorneys at law and counsel. [It] was never the intent of Congress in the year 1789 that the Courts promulgate Rules to correct Congressional mistakes. If the word counsel is surplusage in the Judiciary Act of 1789, then we are going to have to consider why the word counsel was deliberately selected for the Sixth Amendment to the United States Constitution. Wouldn't it have been simpler to use the word Attorney at Law in the Sixth Amendment? The Court's

oath compells the upholding of these laws as they are written and not what any court feels should have been written. That's why we have a separation of power in this Country.

In *Johnson v. Avery 89 S.Ct. 755 (1969)* The Honorable Justice Douglas held:

> "Laymen, in or out of prison, should be allowed to act as next friend to any person in the preparation of any paper, document or claim so long as he does not hold himself out as practicing law or as being a member of the Bar"

Bar Associations today would prevent Abraham Lincoln from acting as counsel to any litigant on grounds [he] was not a member of the Bar. There is no requirement that a Judge on the Supreme Court of the United States be a licensed member of any Bar. Why would any Court be offended by the presence of layman counsel who was as knowledgeable as to court procedure and the laws of the state as any licensed lawyer?

How does it benefit court procedure to exclude layman counsel and compell laymen litigants to proceed as their own attorneys without having any experience whatsoever?

Petitioners further contend that the equal protection clause of the Fourteenth Amendment would guarantee both sides to any litigation the right to "counsel" and that denying counsel to one side only, would constitute invideous discrimination.

Petitioner feels that [this] Court knows what it's decisions have been in the past as to the equal protection clause and that a recitation of those decisions would add nothing to this petition and place an unnecessary burden on the Court in reading what it already knows to be fundamental.

Hence, Petitioners herein appropriately claim relief under The Judiciary Act of 1789 using the word "counsel" as an alternative to a licensed attorney at law and the usage of the word "counsel" in the Sixth Amendment with full confidence

that this Court will uphold the spirit and intent of the people of the United States when forming [this] government and restricting legislation, and separating the powers of government.

Restricting representation in any court to only licensed members of a Bar Association, would not have been tolerated in the Colonies or in the days of Abraham Lincoln and to permit any association to monopolize access to the courts over the basic human rights of the individual can only result in degrading our entire judicial system for the pure economic interest of the legal profession which has steered away from their goal of protecting the public through licensing procedures and now strive to protect their business from being infringed upon by litigants who would prefer to have the assistance of layman counsel rather than no assistance at all.

It Was Error for the State Courts to Allow a Public Body to Proceed Under Repealed Legislation for the Economic Well Being of One of our Citizens.

Oregon Constitution Art. I Section 1:

"We declare that all men, when they form a social compact are equal in right:

That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such manner as they may think proper"

Article I Section 20

"No law shall be passed granting to any citizen or class of citizens privileges or immunities, which, upon the same terms shall not equally belong to all citizens"

Petitioners Writ of Mandamus attempted to stop the state agency from administering a Gubernatorial Retirement Fund after the effective date of its repeal. The State Court generally

held that the Gubernatorial Retirement Act was a contract that superseded the will of the people. That the repeal of the Act by the vote of the people was not going to interfere with the contract that Tom McCall signed into legislation himself when [he] was Governor. The Oregon Courts put the law of contracts before the Oregon Constitution as to the will of the people and equality of privilege.

Under Oregon law, Public employees must contribute a minimum of 10 years before being eligible for a pension. Tom McCall only made contributions of two years before the legislation was repealed at a general election. His pension comes from the same basket as all other public employes'. Hence, Petitioners herein appropriately claim relief under the equal protection clause of the *Fourteenth Amendment* to the Federal Constitution, as the same pertains to the equal protection of the Constitutional provisions (supra) of the Oregon Constitution which would appear to restrict a public body from selecting one of our citizens and showering him with benefits over and above that of other citizens under the same terms, and doing so in the face of and under pretense of authority from repealed laws.

It Was Error for the Oregon Court of Appeals and Supreme Court to Enact Legislation declaring that only Active Members of the Oregon State Bar shall argue unless the Court on Motion orders Otherwise.

Oregon Supreme Court and Court of Appeals
Rules of Procedure

Rule 8.10

*"***Only active members of the Oregon State Bar shall argue unless the court, on motion, orders otherwise"*

The Oregon Supreme Court allows non-lawyer litigants to argue oral upon request, but the Oregon Court of Appeals has never allowed any layperson to argue orally on motion or otherwise.

All other cases are argued orally without filing any motion. Petitioners contend that such a rule constitutes legislation and discriminates against all those who act in propria persona.

Oral argument is a privilege and as a privilege it should be extended to all those coming before the court on appeal.

Petitioners know of no other court in the United States that, by court rule, declares who can practice law before it.

The Court can bar all oral argument if it wants to, but if it extends oral argument only to licensed Bar members, that's discrimination. Since state law determines who may practice law in the state of Oregon, the Courts violate the separation of powers in government when they by court rule determine who may practice law before [their] Court.

Federal Courts allow laymen and laywomen to argue their own causes personally and in person. All other courts in the State of Oregon allow laypersons to argue their own causes personally and in person, all but the Oregon Court of Appeals.

In Oregon all cases are argued orally except those where one side or the other is a layperson exercising rights granted by the Judiciary Act of 1789 and by state law.

The Rule is unconstitutional on its face under the two great clauses of the 14th Amendment both as to equal rights, privileges and immunities and as to due process which is defined as having notice and a full hearing.

Oral argument may be a privilege in the appeals courts, but the privilege must be granted without discrimination towards those who choose to appear in propria persona.

The Oregon courts do not take kindly towards those who want to represent themselves and a good percentage of Oregon judges treat laypersons as if they had leprosy. One layman has overcome the prejudice at least before the Oregon Supreme

Court, but even Mr. Wright has never been permitted to argue his own cases before the Oregon Court of Appeals. Mr. Wright has taken that question to the Ninth Circuit and is waiting a decision. *Wright v. Oregon Court of Appeals* No.75-427 USDC Oregon.

CONCLUSION

The Court is urged to review this matter in order to clarify the full intent of the founding fathers usage of the word "counsel" in the Sixth Amendment and the intent of Congress in the Judiciary Act of 1789 Ch.20, section 35, 1 stat. 92 which appears to give a litigant a choice of representation by "Himself or Herself," by "counsel" or by "attorney at law."

There is no surplusage in the Act and the alternatives offered were well understood in the common law at the time of its passage by Congress. Counsel and attorney at law have two distinct and separate meanings to everybody except licensed members of a Bar Association whose reasons are prompted by professional inertia and desire to restrict our courts for the exclusive usage of members of [their] profession and to the desperation of those who cannot afford them.

This petition was prepared with the assistance of Robert J. Wright, who does not hold himself out to be qualified by virtue of any formal education or by license and who does not set himself out as being a member of any Bar Association or who graduated from any law school or even went to law school. He has done so in the true spirit of the pioneer and as next friend with no charge whatsoever for his assistance.

Respectfully submitted

Adolph Hoffman

Rudolph Ness

APPENDIX A.

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

Albert Hoffman and
Rudolph Ness, Appellants,

v.

No. 75-6115
CA 8508

Public Employes' Retirement Board, Respondent.

* * * * * *

Appeal from Circuit Court, Lane County.

Frank J. Yraguen, Judge Pro Tempore.

Submitted on record and briefs September 9, 1977.

Albert Hoffman and Rudolph Ness, Eugene, filed the briefs pro se for appellant.

James A. Redden, Attorney General, W. Michael Gillette, Solicitor General, and James C. Rhodes, Assistant Attorney General, Salem, filed the brief for respondent.

Before Schwab, Chief Judge, and Thornton and Joseph, Judges.

JOSEPH, J.

Affirmed.

JOSEPH, J.

Plaintiffs obtained an alternative writ of mandamus against the Public Employes' Retirement Board[1] to require that it "Stop acting as trustee for any gubernatorial retirement funds paid by any governor or former governor after the date of December 7, 1972 and that gubernatorial benefits be computed on amounts actually received on or before the effective date of the repeal of the aforesaid gubernatorial retirement fund." After a hearing on the return to the writ, the trial court "dissolved" the alternative writ and denied the issuance of a peremptory writ. Plaintiffs appeal.

In 1971 the Legislative Assembly enacted a law providing retirement benefits for Oregon's governors. Oregon Laws 1971, ch 686 (codified as ORS 176.650 to 176.730). The Act created a Gubernatorial Retirement Fund to be administered by the Public Employes' Retirement Board as trustee.[2] It had an emergency clause and became effective on July 1, 1971. Pursuant to Section 10 of the Act, then Governor McCall began to make contributions to the fund.

In July, 1972, an initiative petition to repeal the 1971 Act was certified for the November General Election. The voters repealed the law, effective December 7, 1972. Governor McCall continued to have withheld from his salary the required monthly contribution to the fund until the end of his term in December, 1974.

In October, 1974, a complaint for declaratory judgment was filed in Marion County by "Taxpayers Protective Association of Oregon, Inc." and a private individual against James L. McGoffin "as Director of the Oregon Public Employees Retirement Board," State Treasurer James Redden, Attorney

1. The briefs refer to the Public Employes' Retirement Fund as the defendant; the pleadings correctly name the Board as defendant.

2. Nothing in the language of the statute tied the right to receive a retirement benefit to the quantity of money in the fund or the existence of the fund.

General Lee Johnson[3] and Governor McCall. The complaint alleged that the 1972 initiative repeal had abolished the fund; that contributions to the fund from the Governor's salary and from legislatively appropriated funds after December 7, 1972, were illegal; that any payments of benefits to Governor McCall would be illegal; that any claimed interest of Governor McCall in the fund was illegal and void because it would violate Oregon Constitution, Art. I, §§ 32 and 20, and Art. IV, § 24, and would have no statutory sanction; and, finally, that the past, present and future actions of the defendants would be "a plain, arbitrary, and capricious abuse of their public offices and trust, and not in the public interests * * *." One of the verifiers of the complaint signed himself "R. J. Ness—Pres. Taxpayers Protective Association of Oregon, Inc." The matter came before the Marion County Circuit Court on the pleadings and stipulated facts. On November 27, 1974, that court entered an "Order" as follows:

> "IT IS HEREBY ORDERED, DECREED AND DECLARED that defendant McCall be and hereby is eligible and lawfully entitled to the Gubernatorial retirement benefits under the provisions of Oregon Laws 1971, Chapter 686; and
>
> "IT IS FURTHER ORDERED AND DECREED that the defendents McGoffin and Redden, or their successors in office, be and hereby are directed to comply with all the provisions of said Oregon Laws 1971, Chapter 686 as to defendent McCall."

The plaintiffs filed a notice of appeal to this court. On April 8, 1975, that appeal was dismissed for want of prosecution; it was not reinstated. It follows that the order of the Marion County Circuit Court is valid and subsisting.

3.A demurrer was subsequently sustained on behalf of the Attorney General.

On December 17, 1975, these plaintiffs filed a petition for an alternative writ of mandamus; the writ issued the next day. Although the matter came on for hearing on January 22, 1976, the record is not clear as to just what happened then, for on June 14, 1976, an identical writ issued. The order challenged here was on the latter writ. The petition and writ alleged the trustee status of the Board until the 1971 law, the repeal of that law in 1972, and that the Board "has the duty to comply with the complete repeal of the aforesaid Gubernatorial Retirement Fund and no longer has jurisdiction to act as trustee for any funds paid by any governor after the effective date of the 'repeal' " but had failed and refused to perform that duty. The only material allegation which was not in substance the same as a correlative allegation in the 1974 Marion County declaratory judgment action appears in paragraph VI of the writ:

> "That the plaintiffs have a general interest in the preservation and protection of rights specifically reserved to them under the Oregon Constitution Article IV[,Section] 1***."

The defendant answered, pleading a general denial and affirmative defenses of the existence of the prior judgement, res judicata and collateral estoppel. After a trial on the merits, the alternative writ was "dissolved" and the peremptory writ was denied.

The trial court found, on the merits, that

> "*** plaintiffs have failed to prove either a right to the relief demanded or that defendant is under a corresponding legal duty to act as demanded and as would be required if the peremptory writ were to issue; ***."

And, further,

> "*** that plaintiffs and defendant are in privity with the corresponding parties [in the Marion County case] and that, with the possible exception of a constitutional claim as to the effective date of the repeal of the Gubernatorial Retirement Fund Act (which claim, if it was raised herein, was apparently abandoned by plaintiffs at trial and was, in any event, without merit) the issues in the within action are identical with the issues in said Marion County case, collaterally estopped from obtaining a peremptory writ of mandamus in the within action."

At the trial the only evidence produced by the plaintiffs was the testimony of an employee of the defendant that contributions from Governor McCall's salary had been credited to his account both before and after December 7, 1972, and that the witness had acted on the directions of his supervisor in auditing those funds. Having shown that, plaintiffs argued that in accepting the money after the repeal, the Board acted illegally.[4] The defendant's evidence was directed at establishing facts relating to the collateral estoppel issue.

In their opening brief, plaintiffs make arguments on the merits directed in substance at just one point: When the people voted to repeal Oregon Laws 1971, ch 686, they intended to deny every governor, including specifically Governor McCall, a pension; to administer funds with the objective of providing him) pension is therefore illegal after the repeal. That point is precisely the main one which was sought to be established in the 1974 proceeding. Indeed, when the trial judge in this case suggested that the plaintiff's object was to get an appeal on that question, which was denied them when the attorney in that case suffered the appeal to be dismissed, the plaintiff Ness agreed with the court.

In the Marion County case the plaintiffs alleged their status as taxpayers and that the cause was brought "on behalf of

4. The transcript refers to memoranda by both sides. They are not in the record before us.

themselves and other taxpayers of the State of Oregon." It was, in popular parlance, a "taxpayer's suit." The syllogism recited in the preceding paragraph was fully tested in that action and found neither logically nor legally compelling. That it was never subjected to appellate review was solely the fault of the attorney in that action.[5] Governor McCall was a defendant in the earlier action; he has a judgment in his favor affirming his right to a pension. The then State Treasurer was a defendant in his official capacity; he and his successors were directed to recognize Governor McCall's right to a pension. The Director and Executive Secretary of the defendant, James McGoffin, was a defendant in his official capacity; he and his successors were also directed to recognize Governor McCall's right to a pension.[6]

5. The plaintiff Ness told the court in this case that he first became aware that something was amiss in the appeal of the earlier case by reading a letter to the editor in a newspaper. He was the president of the organization which was one of the plaintiffs in the 1974 action. He contacted the attorney, who acknowledged that the appeal had in fact been dismissed and thereupon refunded the attorney fee the had previously collected. The refund was made to plaintiff Ness.

6. Paragraphs IV and V of the declaratory judgment complaint read:

"That at all times hereinafter mentioned, defendant James L. McGoffin is and has been the duly appointed and qualified Director of the Public Employees Retirement System of the State of Oregon, and was, and is charged by law to appropriate into a trust fund known as the Gubernatorial Retirement Fund certain sums authorized by law to be apportioned from the monthly salary of each individual selected and serving as Governor, for the uses and purposes relating to retirement benefits for Governors as set forth in the Oregon Revised Statutes, as repealed.

"That at all times hereinafter mentioned, defendant Public Employees Retirement Board of the State of Oregon is and has been a duly constituted state agency under the laws of the State of Oregon, and was, and is, charged by law as trustee of the Gubernatorial Retirement Rund, for the uses and purposes relating to retirement benefits for Governors, and claims therefor, as set forth in Oregon Revised Statutes, as repealed."

In the stipulation of facts of that case the Public Employes' Retirement Board was referred to as "the trustee of the Gubernatorial Retirement Fund." The Board was not named in the caption of the complaint and the final "Order" did not mention the Board. The Director has general responsibility for administration of the functions charged to the Board. ORS 237.251, 237.259.

None of those defendants are parties here, but a mandamus directed to the Board would directly affect the functions of the Director. However, the Treasurer, who is the custodian of all state funds and is responsible for disbursing those funds, would not be affected by the mandamus. Moreover, former Governor McCall would still have the benefit of the 1974 judgment.

The record here adequately supports the conclusion that the plaintiff Ness was a moving force in the 1974 action. He verified the complaint; he was president of the corporate plaintiff; and he had or assumed the function of supervising that litigation to some extent at least. The status of the plaintiff Hoffman is not as clear. The corporate plaintiff in the 1974 case was an organization of organizations, and apparently it did not have individuals as members or shareholders. Mr. Hoffman was a member of an organization also formed by Mr. Ness and having a similar name and similar purposes, but that organization may not have been a member of the Marion County plaintiff corporation. Nonetheless, it is clear that Mr. Hoffman knew about the 1974 case, was personally interested in its outcome, supported the plaintiff's objectives and was interested in obtaining a reversal of the result of that case.[7]

The defendant asserts that the identity of defendants in the two actions (i.e., Mr. McGoffin in his official capacity in 1974, ant the Board here), the identity of issues and privity between a plaintiff there and the plaintiff's here is sufficient to invoke

7. The following appears in the transcript of this case:

"MR. HOFFMAN: It seems to me, Your Honor, that this collateral estoppel would refer to the Taxpayers Protective Association. But that Mr. Ness and myself brought this action. And we—we are members, of course, of the Taxpayers Protective Association. But we're separate entities, as I understand it. We lost on one issue in Marion County. But we tried to bring in a new issue, the Constitutionality of the Board accepting these funds. And it's like—if I can make a simile, what the bar association does in the State of Oregon might affect you, but you may not necessarily be involved in ti, in that particular action. And what we're doing here today, I think is separate and distinct from what the Taxpayers Protective Association did in Marion County."

a plaintiff there and the plaintiff's here is sufficient to invoke the doctrine of collateral estoppel. While that conclusion might be accurate, we do not believe the doctrine would form an adequate decisional base for this case. Collateral estoppel would serve only to bar the relitigation of the same issues between the same parties or their privies, and its application here would serve only to suggest that the issues decided in the Marion County case would be relitigated if parties plaintiff could be found who would not be estopped. We believe a related but broader principle should be applied.

The defendant's brief urges that when a suit is brought by one qualifed citizen on behalf of other citizens to determine a public right in a matter of general interest, all citizens are barred from relitigating the issue. In Floersheim v. Bd. of Com's Harding Co., 28 N M 330, 212 P 451 (1922), the principle was stated thus:

> "Where a suit is brought to determine a public right, *** all citizens and taxpayers of the county are parties to the proceeding by representation, and are bound by the judgment, not only as to matters which were litigated, but also as to matters which existed at the time and which could have been litigated in the case, the same as the actual formal parties on the record, regardless of whether they had actual notice of the pendency of the suit or not. [Citations omitted.] 28 N M at 335.

It may be disputed whether extending the principle to matters "which could have been litigated" would be proper, but in this case there is a complete identity between the issue presented in the writ[8] and tried and the main issue in the Marion County case, so there is no necessity for determining the breadth of the rule.

We believe the rule was well stated in Drainage Dist. No.1 Reformed v. Matthews, 361 Mo 286, 234 SW2d 567 (1950):

> " '*** In the absence of fraud or collusion a judgment for or against a municipal corporation, county, town, school or irrigation district, or a board or officers properly representing it, is binding and conclusive on all residents, citizens and taxpayers in respect to matters adjudicated which are of general or public interest such as questions relating to public property, contracts or other obligations. *** The rule is applicable to persons who have notice of the suit and even to person without actual notice of the suit.' ***
>
> "The rule *** is founded upon the basic concepts of privity and virtual representation. The doctrine of virtual representation, well recognized in equity, is based upon considerations of necessity and paramount convenience and may be invoked to prevent a failure of justice. [Citation omitted.] The doctrine is applicable if *** the interest of the represented and the representative are so identical that the inducement and desire to protect the common interest may be assumed to be the same in each and if there can be no adversity of interest between them. *** And under the principles of that rule 'privity' depends more upon the relation of the parties to the subject matter than upon their connection as parties with or any activity in the former litigation. ***" 361 Mo at 302-303.

See also, Sierk v. Reynolds, 484 SW2d 675 (Mo App 1972). So stated, the rule is appropriate to dispose of this case.

The trial court's order and judgment referred to an issue which was possibly not litigated in the Marion County action, relating to the effective date of the 1972 repeal. The point is

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8. Although the writ included a command "that gubernatorial retirement benefits be computed on amounts actually received on or before the effective date of the repeal of the aforesaid gubernatorial fund," no evidence or argument was had on the point, and it must be treated as abandoned.

not clear in the pleadings, argument at trial or in the briefs. In their brief, plaintiff's refer to language in Oregon Constitution, Art IV, § 1(4) (d):

> "**** A referendum ordered by petition on a part of an Act does not delay the remainder of the Act from becoming effective."

The suggestion is that the filing of an initiative petition in 1972 somehow retroactively suspended the 1971 Act's effective date. Plaintiffs have confused the effect of a referendum, which does suspend the effective date of an act, and an initiative, which has no such effect. Oregon Constitution, Art IV, §§ 1(4) (d), 28. Oregon Laws 1971, ch 686, had been effect for more than 17 months before it was repealed. Even if this was a "new" point not raised in the Marion County proceedings, it was utterly without merit and its inclusion in the pleadings added nothing to plaintiffs' case.

Just before the trial in this case, plaintiffs filed a motion asking the "Court's permission to allowl Mr. [Robert J.] Wright to act as counsel for the plaintiffs in the above entitled case and to admit him to the practice of law in this one case only." When the motion was argued the court pointed out that Mr. Wright was then under a permanent injunction forbidding him from practicing law. Plaintiffs ackowledged that fact. It is impossible to see how the trial judge could, under any circumstances, have allowed the motion. In their briefs plaintiffs rely upon ORS 9.310 to make a distinction between "an attorney" and "counsel." Whatever the utility of that distinction might be in some circumstances, nothing could be plainer than that these plaintiffs were asking the court to permit Mr. Wright to practice law for them. The trial judge could not do that.

The order and judgment of the trial court is affirmed.